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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-653

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.,
Petitioners

v.

MICHAEL B. ANDERSON, ET AL.,
Respondents

BRIEF OF JOHN W. MALLEY AMICUS CURIAE

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Interest of the Amicus Curiae

I respectfully submit this brief under Rule 42 on my own behalf as a graduate of the United States Naval Academy and a citizen deeply interested in the welfare of that Institution and the United States Navy. I am a member of the bar of this Court.

I have received the consent of the Solicitor General to the filing of an amicus curiae brief and a statement by Warren K. Kaplan, Esq., counsel for Respondents

and with reference to Rule 42, that he has "no objection" to my filing an amicus brief.

The reason for submitting this brief is my belief that the Petition as well as the appeal record in the Court of Appeals below do not emphasize sufficiently the historical purposes of the Naval Academy chapel services to foster a sense of honor, loyalty and devotion to duty in Officers in their service of God and Country.

ARGUMENT

The Successful Encouragement at the Naval Academy for Well Over A Century, of the Ideals of Honor, Loyalty and the Sense of Duty in the Service of God and Country Should Not Be Lightly Set Aside, At Least on Such an Incomplete Record as This One, Considering the Devastating Nature of the Decision of the Court of Appeals.

According to the affidavit of Rear Admiral James Calvert (App. 33), the Naval Academy Regulations have included since the year 1853 a provision for Sunday chapel attendance by Midshipmen as a regular part of the Naval Academy training of future naval officers, and the Articles for the Government of the U.S. Navy at that time charged Commanding Officers with the responsibility "to take care that divine services were performed,—and that they cause all, or as many of the ship's company that can be spared from duty, to attend at every performance of the worship of Almighty God." *Act of April 23, 1800. 6th Congress, 1st Session, 2 Stat. 45.*

The historical purpose of the chapel services at the Naval Academy is to foster a sense of honor, loyalty and devotion to duty in officers in their service of God and Country. The chapel services are *not* aimed at establishing, sponsoring or supporting a religion. Un-

fortunately, the record for appeal made for the Academy is not one which sufficiently emphasizes these high purposes and their historical success.[1]

The brigade of Midshipmen is an entity, as are the organized units of all military organizations. The success of the training of Midshipmen should be judged not by the complaints of one or two or a handful of them, but by the history of performance as Officers of the graduates of the Academy taken as a whole.

The successful training of Midshipmen should not be judged and then interfered with, even in part, on the testimony of a few individuals, such as one retired Chaplain, one psychiatrist, one Jesuit Priest, one Rabbi, etc. The Naval Academy should not be hampered in its mission by piecemeal prohibitions[2] of the Courts. If the decision of the Court of Appeals should stand, is it not likely that the divine service themselves will be challenged, on the ground that the very conduct of such services violates the First Amendment? If successful, the Naval Academy Chapel would be accepted only as a museum. Would there be reason for carrying prohibitions that far? Is there any *real* reason for carrying prohibitions as far as does the present decision of the Court of Appeals?

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[1] On the other hand, the record made by the Plaintiffs-Appellants below was not one which would justify overturning a practice which had endured successfully for well over a century.

[2] I use the plural, because it seems evident from the briefs filed below, that intense feelings were involved, and if the Naval Academy is placed under a prohibition of the Courts as to one of its practices, it may be expected that other challenges of Academy authority will be inspired. Surely this was not contemplated by the prayer decision of *Abington* v. *Schempp*. 374 U.S. 203.

If the Naval Academy is to be challenged as to the manner in which it conducts divine services in the chapel or if the continued existence of the Chapel as such is to be questioned, it should be on a record which covers the whole history of the performance of the Academy in training Officers for the Navy.

In 1917, Franklin Delano Roosevelt (then Assistant Secretary of the Navy), who was an authority on Naval history, wrote a Foreword in a book by Ralph Earle "Life At The United States Naval Academy,"[3] in which he stated that the book"—gives clearly and definitely the history, the life and the aims of the greatest national institution of learning—." Of the Chapel, Ralph Earle wrote:

> "The dome at the Naval Academy Chapel is the first object that greets the eye as one approaches Annapolis either by land or sea—. Possibly it was thus planned in order to keep within the horizon of the Midshipman's life the fact of the existence of the Creator of all good—.
>
> The regular 'Official Divine Service' is held in the chapel every Sunday morning—. All Midshipmen are required to attend except—Roman Catholics, together with a few of other denominations who have obtained—permission—, to attend the service of their choice in—Annapolis—. The service is hearty and inspiring, conducing to the love of one's country and is undoubtedly of vast benefit to the Midshipmen—.
>
> The daily prayers, said after breakfast in the mess hall by the Chaplin—and the one attendance at Church on Sundays are the only compulsory features of the Midshipman's religious life. These

[3] G. P. Putnams Sons, New York and London V 415. Pl E2.

help him to realize that he is not merely an individual, but is a member of an organization—as is evidenced by the prayer for his brothers in the fleet—and by the hymn which closes every divine service commending to the care and protection of the Eternal Father, all 'Those in peril on the sea.'"

As is obvious, I have not been able to devote as much time as I would like to show how inadequate was the record which was considered by the Court of Appeals. By a visit to the Chapel, I found a few expressions recorded on the walls which indicate what kind of a record might have been considered, before making a decision as important as that which was made by the Court of Appeals.

Admiral James L. Holloway wrote a letter on Jan. 8, 1965 with regard to his tour of duty as Superintendent. He said—"The Chapel and its moving service was at once a joy and an inspiration to us. It is truly the heart of the Naval Academy, and there is no one who has seen it that is not better therefor." Another letter on the wall of one of the corridors of the Chapel, is by Vice Admiral W. R. Smedberg, III and evidently speaks of his tour as Superintendent in about 1956-1958. His letter says in part: "—to the majority of graduates at the Naval Academy, the Chapel Service has a significance which deepens with each passing year. As Midshipmen we accepted it with varying degrees of enthusiasm, but I think almost all of us were proud to have been a participant in it on graduation day.—later—many of us found ourselves drawn back to the Chapel—, finding increased pride in the acknowledgement of service to God and Country which the chapel service connotes."

A poignant note in Admiral Smedberg's letter dealt with a visit of President Harry Truman to the Chapel. The letter says: "When I followed President Truman down the aisle—heard him say as he wiped his eyes 'Every American should be privileged to attend this service.' "

Many years ago graduating midshipmen gave voluntarily as their departing gift to the Academy, a beautiful and expensive window for the Chapel, showing a young graduate in uniform which suggests to me his belief and faith in God. The window contains this inscription:

> "In Reverent Tribute to all the Sons of Their Alma Mater, who in War and in Peace Have Realized Her Ideals of Honor, Courage, Loyalty and Duty in the Service of God and Country, This window is Placed here by the Class of 1927."

I respectfully suggest that all of the above indicates the irreparable harm which may be done to the Naval Academy and the Naval Service, if the decision of the Court of Appeals is allowed to stand. Surely, the application of *Walz* v. *New York,* 397 U.S. 664, 686 is warranted, in that a practice which has stood for well over a hundred years "by common consent" should not have been overthrown on such a dubious record as this one. As stated in Justice Stewart's dissent in *Abington* v. *Schempp,* 374 U.S. 203, 319, the record is "—wholly inadequate to support an informed or responsible decision."

The danger our country faces today is the decline in spirit and morality observable among young and old alike. The Supreme Court should not let stand a decision which would weaken the Naval Academy at the point where it now needs its greatest strength.

CONCLUSION

The chapel services at the Naval Academy are not aimed at establishing, sponsoring or supporting a religion. They do recognize belief and faith in the Creator, and foster honor, loyalty to Country and devotion to duty. The practices of the Academy have contributed to the successful training of Naval officers for well over one hundred years. They should not be prohibited, especially on the inadequate record which was before the Court of Appeals below.

It is respectfully submitted that the petition for writ of certiorari should be granted.

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